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No. 90-1128

In The

Supreme Court of the United States

October Term, 1990

GLORIA E. KIRBY,

Petitioner,

v.

OMI CORP.,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal, First District, State Of Florida

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the conclusion of the Florida First District Court of Appeal that a shipowner cannot be held liable when a repairman is injured by the very condition he is hired to correct warrants further review.

2. Whether this Court's time is warranted in reviewing a decision that does not exonerate vessel owners from liability for damages caused by the owner's alleged failure to comply with federal regulations governing the ship's plans and drawings.

3. Whether the issue of federal maritime law pre-emption of state wrongful death statutes for deaths occurring on state territorial waters is properly raised at this time absent a finding of vessel liability; or whether the issue raises a significant question meriting this Court's attention absent any decisions inconsistent with the clear precedent established in holdings of this Court.

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STATEMENT OF THE CASE

This is a maritime wrongful death action applying maritime law pursuant to § 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1984). Petitioner, the widow of a shipyard worker, brought an action against Respondent, OMI Corp., claiming vessel negligence which allegedly caused fatal injuries incurred by her husband while he was making repairs to the vessel OMI WABASH.

OMI Corp., is the owner of the OMI WABASH. At the time of the injury to Petitioner's decedent, Roy A. Kirby, Sr., OMI Corp. had relinquished control of the OMI WABASH to North Florida Shipyards, Inc. pursuant to a contract for vessel repairs and the installation of a new ballast system. (T. 595)[1] Mr. Kirby was employed by the shipyard as a pipefitter.

The evidence at trial showed that the OMI WABASH was the last of five ships[2] owned by OMI Corp. to undergo substantially identical modifications to their segregated ballast systems at North Florida Shipyards. (T. 718-720). The specifications provided to the shipyard for the OMI LEADER, the first ship modified, were the specifications used on all the vessels including the OMI WABASH. (T. 718-719). While these plans were reasonably specific, the OMI LEADER's specifications were adapted

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[1] T. ___ refers to the Trial Transcript.
PP. ___ refers to Petitioner's Petition for Writ of Certiorari.

[2] The five ships were the OMI LEADER, OMI WILLIAMETTE, OMI CHARGER, OMI CHAMPION, and the OMI WABASH. (T. 720).

"on-site" for the subsequent vessels. (T. 721). OMI's Port Engineer, Walter Gustafson, remained with the vessel to ensure compliance with the plans and specifications and to make any changes to the plans that were needed on an individual ship basis. (T. 289). The plans and specifications provided to the shipyard had been reviewed for compliance with the rules and regulations of the U.S. Coast Guard and had been approved on behalf of the U.S. Coast Guard by the American Bureau of Shipping. (T. 192-193) (See Appendix).

Petitioner alleges that the plans called for an incorrect type of pipe fitting in a particular location and that the shipyard performed the modifications as required by the plans. (PP. 5). However, the Record shows that the plan's requirements were modified by the shipyard itself prior to the date of the accident when it elected to install an elbow joint rather than a T-joint as called for in the plans at the location where the accident occurred. (T. 610). The Record also shows that four days before the accident, the shipyard had inspected its work at this particular location and had found its own work inadequate. (T. 609-614). The shipyard had delegated the responsibility for correcting its work to Mr. Kirby and another shipyard employee. (T. 614). At the time of the accident, these corrections had not been made. (T. 611-612).

On the morning of the accident, OMI's Port Engineer inspected the shipyard's installation of the pipe fitting and found it unacceptable. His dissatisfaction was communicated to the shipyard's coordinator, Oland Cutchin, an employee of the shipyard, who in turn directed certain shipyard employees to perform the requested repairs. (T.

635, 785). The requested repairs were assigned to Mr. Kirby and another shipyard worker. (T. 396, 397-398). The responsibility for assigning and scheduling the repairs belonged to and remained with the shipyard. No one from OMI Corp. assumed the responsibility for assigning, scheduling, or supervising the work of the repairs. (T. 639). The repair work was in progress when Mr. Cutchin ordered the hydrostatic testing of the piping system on which Mr. Kirby was working. (T. 639-644).

There is no testimony in the record, as Petitioner suggests, that indicates that a hydrostatic test on the lines had already been started when OMI rejected the installation and requested the needed repairs. Neither is there any testimony in the record that supports Petitioner's statement that OMI's Port Engineer remained to supervise the requested changes. (T. 403-404). In fact, Petitioner had an opportunity to call the only witness who could attest to this statement, but failed to do so.

After a jury verdict finding vessel negligence, the trial court granted Respondent's Motion for Judgment in Accordance With Directed Verdict. Even though there was conflicting evidence regarding whether the plans OMI Corp. submitted to the shipyard were defective, the trial court stated:

> There can be no other conclusion drawn from the evidence in this case but that the dangerous condition which caused the accident was the conducting of a hydrostatic test on the piping system of the OMI WABASH at the same time that repairs were being made by Mr. Kirby on the pipe being tested. *Kirby v. OMI Corp.*, 1989 AMC 1079 at 1085.

In affirming the trial court's judgment, the Florida First District Court of Appeal found that all of the evidence demonstrated that the shipyard was aware of the defective condition of the pipe restraint prior to the accident. *Kirby v. OMI Corp.*, 561 So.2d 666 (Fla. 1st DCA 1990). With this knowledge, the court stated that it was not possible to conclude that the plans furnished by OMI Corp. had caused Mr. Kirby's injuries. *Id.* Even if OMI Corp.'s instructions to the shipyard to correct the plans had been inadequate, the court concluded that the shipowner's actions still had not caused Mr. Kirby's death. Rather, his fatal injuries occurred as a result of the shipyard's scheduling a hydrostatic test while workers were repairing the pipeline. *Id.* In making this determination, the court relied on the following unrebutted testimony by Mr. Cutchin, the shipyard's ship coordinator:

> "Q: Did the port engineer or anyone from the OMI WABASH have anything to do with scheduling that repair?
>
> A: No, sir.
>
> Q: Was that entirely up to the shipyard?
>
> A: That's entirely up to the shipyard."
>
> . . .
>
> Q: Had a decision been made to or was a decision made to conduct a hydrostatic test that day on the OMI WABASH?
>
> A: Yes, sir. I made the decision. . . .
>
> Q: Did the port engineer or anyone from the OMI WABASH have anything to do with scheduling that hydrostatic test?
>
> A: No, sir.

. . .

Q: Mr. Cutchin, did you know that Mr. Kirby was doing that repair at the time you made the decision to start the hydrostatic test?

A: No, sir. If I had of, I would not have started the hydrostatic test.

Q: And why is that?

A: Well, you're never supposed to hydrostatically test a line if someone's working on it. Never.

Q: As between the owner of the OMI WABASH and North Florida Shipyard, who was responsible for making sure that Mr. Kirby was not in the tank working on this pipe during the hydrostatic test?

A: Unfortunately we are, North Florida Shipyard.

Q: Was there anything inherently dangerous about installing hangers or stops on that line down in the number two tank?

A: Under normal circumstances, no sir. (T. 639-644).

Relying on this Court's decision in *West v. United States*, 361 U.S. 118 (1959), and the decision in *Peters v. Titan Navigation Co.*, 857 F.2d 1342 (9th Cir. 1988), the District Court of Appeal concluded that a shipowner is not liable when a repairman is injured by the very condition he is hired to correct. 561 So.2d at 670.

Analyzing the shipowner's duty to intervene and prevent the hydrostatic test, the court held that under *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), the shipowner had no duty to intervene in the

repair operation absent actual knowledge that a hydrostatic test would be conducted on the pipeline at the same time it was being repaired. 561 So.2d at 670. The court found that "all of the evidence demonstrated that the shipowner was unaware of the hydrostatic test and was therefore in no position to intervene to prevent the accident." *Id.*

Finding no liability for vessel negligence, the District Court of Appeal did not reach Petitioner's other points on appeal. One of the issues not reached was Petitioner's argument that the trial court erred in failing to give a Florida Standard Jury Instruction for claims arising under the Florida Wrongful Death Act, Fla. Stat. § 768.16 et seq. (1985). Petitioner argued that while maritime substantive law applied to issues of liability, Petitioner's remedy in damages should be governed by the provisions of the Florida Wrongful Death Act. In so arguing Petitioner and her dependents presumably would have been entitled to recover for mental pain and suffering, an element of damages not recoverable under general maritime law.

The Supreme Court of Florida declined to review the decision of the Florida First District Court of Appeal.

SUMMARY OF ARGUMENT

I.

The Florida First District Court of Appeal correctly upheld the trial court's directed verdict based on this Court's decisions in *West v. United States*, 361 U.S. 118 (1959) and *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156 (1981). Nothing novel is presented in

the lower court's application of the facts to the law of *West* or *Scindia*, nor does the lower court's decision conflict with these decisions.

Petitioner alleges conflict with *Scindia* because she incorrectly identifies the dangerous condition that caused the decedent's injuries. The dangerous condition was not the arguably defective plans, but rather the shipyard's scheduling of a hydrostatic test of a pipeline at the same time the Petitioner's husband was making repairs to that pipeline.

The OMI WABASH had been turned over to a shipyard for repairs and the installation of a new ballast system. Respondent had submitted plans approved for compliance with Coast Guard regulations which Petitioner argued were defective. Unrebutted testimony at trial showed that the alleged defect in the plans had been recognized prior to decedent's injuries, and decedent's employer had been asked to correct the defect. Thus, the District Court of Appeal held as irrelevant any question of a duty arising prior to control of the vessel being relinquished to the shipyard. Having hired the shipyard to repair, modify and test the vessel's ballast system, the vessel owner was under no duty to protect a shipyard worker from risks that were inherent in carrying out the contract. 361 U.S. at 123.

The vessel owner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop once the vessel is turned over to the shipyard. *Scindia*, 451 U.S. at 172. An exception to this rule exists only if the shipowner had actual knowledge of a danger on the ship and is aware

that the shipyard is not taking reasonable steps to protect its shipyard workers from this dangerous condition. 451 U.S. at 175-176. Unrebutted evidence at trial demonstrated that the vessel owner did not know when the repairs would be performed nor when the hydrostatic test would be conducted, and was not aware that they would be performed and conducted at the same time. Applying the *Scindia* standard, the District Court of Appeal correctly found that the shipowner had no duty to intervene to prevent the hydrostatic test.

II.

The plans and drawings submitted to the shipyard had been reviewed for compliance with the rules and regulations of the U.S. Coast Guard by the American Bureau of Shipping on behalf of the Coast Guard. (See Appendix). While the opinion concedes that there was sufficient evidence to allow a jury to conclude that the plans were defective, the opinion does not indicate or discuss whether non-compliance with federal regulations made the plans defective. In any event, the opinion below holds that defective plans did not cause decedent's injuries. The decision, therefore, could not have the effect of exonerating vessel owners from liability for damages allegedly caused by the failure to comply with federal regulations governing the vessel's plans and drawings.

III.

Petitioner states that federal maritime law should be applied in this maritime wrongful death action, but argues that the trial court incorrectly denied Petitioner's

request for a jury instruction on the measure of damages under the Florida Wrongful Death Act, Fla. Stat. § 768.16 et seq. (1985). The District Court of Appeal did not reach this issue because no liability was found. Absent liability, Respondent suggests that Petitioner is merely asking this Court for an advisory opinion on this issue and review of the issue is not warranted. In any event, Petitioner presents no convincing evidence of the issue's importance. Review by this Court is not warranted where clear and unconflicting precedent on this issue exists in state and federal courts.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Respondent submits its argument to this Court by addressing issues in a different order from their presentation in the Petition for Writ of Certiorari. Petitioner acknowledges that Respondent's liability is governed by federal maritime law and the Longshore and Harbor Workers' Compensation Act. (PP. 7). However, Petitioner's first issue addresses the question of damages only, a question Respondent suggests is moot absent a finding of liability. Accordingly, Respondent first addresses Petitioner's issues regarding liability for alleged vessel negligence.

A. Section 905(b) Shipowner Liability in a Ship Repair Context

Petitioner posits a conflict with *Scindia Steam Navigation Co. v. De Los Santos, supra,* which is non-existent. Her

assertion that the decision of the Florida First District Court of Appeal relieves the vessel owner of *any responsibility* to take reasonable precautions for the safety of harborworkers prior to the vessel's delivery to a shipyard is unwarranted hyperbole. (PP. 14) Petitioner's argument ignores the law upon which the lower court's opinion is based, and the significant factual distinction between the cargo handling operations involved in *Scindia* and the ship repair context of the present case. Petitioner's argument also ignores the negligence-based principles upon which the opinions of both *Scindia* and the District Court of Appeal rest.

The 1972 Amendments to the Longshore and Harbor Workers' Compensation Act statutorily codified a longshoreman's right to recover for negligence, but it did not expand or change the existing negligence cause of action a longshoreman could bring against a vessel. 451 U.S. 156, 165. A maritime tort action in negligence, like its land-based counterpart, must show (1) existence of a duty; (2) breach of that duty; and (3) damages proximately caused by the duty's breach. The duty owed in a maritime negligence action is one of reasonable care under the circumstances. 451 U.S. at 163 n. 10. This Court in *Scindia* did not change that duty. Rather, using land-based tort principles, this Court helped to further define the duty owed by a vessel owner to a longshoreman in a negligence cause of action brought under the LHWCA.

Petitioner incorrectly states that the District Court of Appeal's decision conflicts with *Scindia*. It does not conflict with *Scindia* but follows the holding in that case. In addition, the decision below relies on another and more

factually similar decision of this Court. *Scindia* involved a vessel owner's liability in cargo loading and unloading operations. The present case differs subtly, but significantly from *Scindia*, in that it involves a vessel owner's liability in a ship repair context. With this distinction, the District Court of Appeal correctly looked to the Court's decision in *West v. United States*, 361 U.S. 118 (1959), to help determine the duty owed by a vessel owner in a ship repair context.

In *West*, like the present case, a vessel had been turned over to a shipyard for an overhaul. One of the specifications of the contract was to clean, repair, and test all water lines including the replacement of plugs and other parts. A shipyard worker was injured by one of the plugs when another shipyard worker turned on the water without warning, forcing off the loose plug, a case almost identical to the one here. In denying vessel owner liability, the Court held that a vessel owner, having hired a shipyard to recondition and test a vessel, was under no duty to protect a shipyard worker from risks that were inherent in carrying out the contract. 361 U.S. at 123. The Court stated:

> It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The respondent, having hired Atlantic [shipyard] to perform the overhaul and reconditioning of the vessel – including the testing – was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract. 361 U.S. at 123.

Likewise in the present case, the OMI WABASH had been turned over to the shipyard for modifications. One of the specifications called for replacement and modification of the existing ballast system. The decedent was injured while making the required modification.

The decedent was not injured by defective plans or any condition existing prior to the vessel's delivery to the shipyard. The Petitioner's decedent was fatally injured when the shipyard initiated a high pressure, hydrostatic test of the same line that the decedent was simultaneously repairing. The lower court found that even if the vessel owner delivered defective plans to the shipyard prior to relinquishing control of the vessel, the shipowner had cured that defect by its actions on the day of the accident. By refusing to accept the shipyard's work and requesting that the shipyard make the needed changes to properly restrain the pipe fitting, the defective plans became irrelevant. The Florida appellate court stated:

> [T]he death did not occur as a proximate result of defective plans or defective modifications to plans. Rather, the fatal injuries resulted from scheduling a hydrostatic test while workers were repairing the pipeline. It was unrebutted that a test should never be conducted on a pipeline while shipyard workers are working on the same line. 561 So.2d at 669.

The court below thus applied a duty, breach, proximate cause analysis based on *West* and *Scindia*. The *West* Court acknowledged that under certain circumstances a shipowner could incur pre-delivery liability in a ship repair context for a latent or hidden defect. 361 U.S. at 124. However, this Court in *West*, like the District Court

of Appeal in the present case, found no latent defect and held that a shipowner cannot be liable when a repairman is injured by the very condition he is hired to correct. 561 So.2d at 669.

In addition, the present case presents no conflict with other circuits under similar factual circumstances. The Ninth Circuit Court of Appeals in *Peters v. Titan Navigation Company*, 857 F.2d 1342 (9th Cir. 1988), reached a similar result when a ship repairman was injured in the course of making repairs to a hydraulic system that had been negligently installed prior to its delivery to the shipyard for needed modifications.

The court below applied the principles established in *Scindia* when analyzing Petitioner's additional argument that Respondent should be held liable for failing to intervene to prevent the hydrostatic test on the pipeline being repaired. 561 So.2d at 670. The decision below did not "erode Scindia" or conflict with this Court's definition of the standard of care owed by a vessel owner to a longshoreman. On the contrary, the lower court applied this Court's reasoning in *Scindia*:

> We are of the view that absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. 451 U.S. at 172.

A shipowner has a duty to intervene to protect a longshoreman, according to *Scindia*, only if the shipowner has actual knowledge of a danger on the ship and is aware

that the stevedore is not taking reasonable steps to protect the longshoreman from this danger. See *Scindia, supra,* at 451 U.S. 175-176; *Casaceli v. Martech Int'l, Inc.,* 774 F.2d 1322, 1328 (5th Cir. 1985); *Futo v. Lykes Bros. S.S. Co., Inc.,* 742 F.2d 209, 214 (5th Cir. 1984). The Florida First District Court of Appeal found that a Florida court had similarly applied this law citing to *Murray v. Gulf Coast Transit Company,* 529 So.2d 784 (Fla. 2d DCA 1988).

Unrebutted evidence in the court below demonstrated that the vessel owner was unaware of the hydrostatic test. 561 So.2d at 670. The trial court stated:

> There can be no other conclusion drawn from the evidence in this case but that the dangerous condition which caused the accident was the conducting of a hydrostatic test on the piping system of the OMI WABASH at the same time that repairs were being made by Mr. Kirby on the pipe being tested. The shipowner had no actual knowledge as to when the hydrostatic test would be conducted; it had no actual knowledge as to when the repairs were going to be made; and, therefore, it had no actual knowledge of the dangerous condition which caused Mr. Kirby's death. 1989 AMC at 1085.

Applying the *Scindia* test, the District Court of Appeal correctly found that the shipowner had no duty to intervene to prevent the hydrostatic test. 561 So.2d at 670.

Petitioner compares the present case to *Sammiline Co. v. Woods,* 110 S.Ct. 853 (1990), in which this Court denied certiorari. However, in denying certiorari, this Court noted a conflict between the Third and Fifth Circuits concerning the duty owed a longshoreman for injuries caused by the defective storage of cargo. In making this

comparison, Petitioner again ignores significant factual differences between the present case and the issues as presented in *Sammiline*. The duty a shipowner owes to a longshoreman prior to relinquishing control of a ship to a shipyard as in the present case, or prior to commencing stevedoring operations as in the *Sammiline* case, is irrelevant under the facts of the present case. The decision of the Florida District Court of Appeal, based on unrebutted evidence, held that the alleged pre-delivery defect in the plans had been cured prior to the decedent's accident; and the decedent's injuries were not caused by any defect in the plans.

The determination of the Florida First District Court of Appeal is correct and does not conflict or erode this Court's decisions in *West* or *Scindia*. There is nothing novel in the lower court's application of the law in *West* and *Scindia* to the facts of the present case. The lower court's decision, therefore, does not merit review by this Court.

B. Effect of Alleged Non-Compliance With Federal Regulations in § 905(b) Actions

Evidence presented at trial indicated that the plans provided to the shipyard by the Respondent had been reviewed for compliance with the rules and regulations of the U.S. Coast Guard by the American Bureau of Shipping on behalf of the Coast Guard. (T. 192-193) (See Appendix). Petitioner therefore greatly exaggerates the practical effect the lower court's decision would have on vessel owner liability for failure to comply with federal regulations governing the ship's plans. In fact, while the

opinion concedes that there was sufficient evidence to allow a jury to conclude that the plans were defective, the opinion does not indicate or discuss whether non-compliance with federal regulations made the plans defective.

Even more significant in a determination of the opinion's effect on this issue is the false premise on which Petitioner bases her argument. Petitioner argues that the plans submitted to the shipyard by the vessel owner created a dangerous condition which should subject the vessel owner to liability for decedent's injuries. Petitioner ignores the fact that the dangerous condition was not created by any alleged failure to comply with federal regulations, but by the shipyard's initiating a high pressure, hydrostatic test on the same cargo line upon which the decedent was simultaneously making repairs. 561 So.2d at 669.

The opinion simply does not hold or in any way indicate that a vessel owner is exonerated from all liability for damages caused by the owner's failure to comply with federal regulations governing the vessel's plans and drawings. There is nothing novel about the lower court's decision that warrants review by this Court.

C. State Wrongful Death Statute Pre-Emption

Petitioner acknowledges that Respondent's liability was to be determined by federal maritime law and the Longshore and Harbor Workers' Compensation Act. Curiously, however, Petitioner argues that the Florida Wrongful Death Act, Fla. Stat. § 768.16 et seq. (1985), should provide the measure of damages for the consequences of any negligence. (PP. 7). This issue does not arise until

liability is found. For that reason, the District Court of Appeal did not reach this issue. This Court's review of the issue would amount to an advisory opinion without a judgment of liability. Absent that judgment, review by this Court is inappropriate.

Nonetheless, Petitioner asks this Court to deal with the issue of whether the federal maritime cause of action for wrongful death created in *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), pre-empts state wrongful death statutes for deaths occurring on state territorial waters. Petitioner bases the significance of the pre-emption issue not on any extensive cited or irreconcilable conflict in state or federal law, but on the continued validity of *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

Petitioner asserts that *Moragne* did not provide any indication that *The Tungus* is no longer good law. The *Moragne* decision indicates otherwise. In *Moragne*, the petitioner attacked the findings in *The Tungus* in the court of appeals but not in the trial court. In ruling that her challenge to *The Tungus* was properly before this Court on certiorari, this Court stated:

> Her challenge to *The Tungus* is properly before us on certiorari, and, of course, it subsumes the question of the continuing validity of *The Harrisburg*, upon which *The Tungus* rests. 398 U.S. at 345 n. 3.

This Court went on to say that the parties addressed themselves to the question of whether *The Harrisburg*, 119 U.S. 199 (1886), should be overruled but in so doing the parties fully addressed *The Tungus*. *Id.* It thus seems clear that this Court was looking at both *The Harrisburg* and *The Tungus* when it created the federal maritime cause of

action for wrongful death, and did not avoid the preemption issue as Petitioner suggests.

Petitioner also seems to argue that if *Moragne* preempts the application of state wrongful death statutes to maritime death actions, it does so in contradiction to one of the reasons the *Moragne* Court fashioned the new wrongful death remedy. That reason being, according to Petitioner, a "special solicitude for the welfare of maritime workers." (PP. 11). But Petitioner misstates this Court's basis for "fashioning" the new maritime wrongful death remedy in *Moragne*. While a "special solicitude for men who undertake to venture upon hazardous and unpredictable sea voyages" is recognized by the *Moragne* Court as a general principle of maritime law, the Court did not base its decision on this principle. It is clearly stated:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts . . . Such uniformity will give effect to the constitutionally based principle that federal admiralty law should be a 'system of law co-extensive with, and operating uniformly in, the whole country'. 398 U.S. 375 at 401 (quoting) *The Lottawanna*, 21 Wall 558, 575 (1875).

In *Miles v. Apex Marine Corporation*, 59 U.S.L.W. 4001 (U.S. November 6, 1990), this Court recently reaffirmed the importance of a system of maritime law operating uniformly in the whole country. A system of law that

would allow a shipyard worker to use substantive maritime law as a basis of liability and state law as a measure of damages would run counter to the rationale and theory clearly stated in *Miles, Moragne* and *The Lottawanna.*

In fact, *Moragne* anticipated that the issue of the measure of damages would become a part of its general maritime wrongful death remedy, but left it to the lower courts to fashion. 398 U.S. at 361. In *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), it was subsequently decided what the measure of damages should be in a maritime wrongful death claim. The award of damages for mental anguish or grief was specifically excluded. 814 U.S. 585 at n. 17.

The Court has permitted state law to supplement maritime law only in areas where maritime law does not conflict with state law. *Chelentis v. Luckenbach S.S. Co.,* 247 U.S. 372 (1918); *Southern Pacific v. Jensen,* 244 U.S. 205 (1917). Permitting a state wrongful death act to supplement and/or change the measure of damages to be recovered under the general maritime law would destroy any uniformity in the general maritime law. This principle has been applied in wrongful death actions by federal courts sitting in admiralty and diversity, and in state courts under the savings to suitors-clause of 28 U.S.C. § 1333 (1949).

The Ninth Circuit, in *Evich v. Morris,* 819 F.2d 256 (9th Cir.) cert. denied, 484 U.S. 914 (1987), and *Nelson v. United States,* 639 F.2d 469 (9th Cir. 1980), has held that *Moragne* pre-empts state wrongful death actions for deaths on territorial waters. In *Matter of S/S Helena,* 529 F.2d 744 (5th Cir. 1976), the Fifth Circuit held "that the wrongful death remedy provided by [*Moragne*] precludes recognition in

admiralty of state statutes". *Id.* at 753. A footnote in *S/S Helena* suggests that the court did not decide if *Moragne* pre-empted state wrongful death statutes in maritime wrongful death cases brought under a federal court's diversity jurisdiction. *Id.* at 748 n. 5. This issue was specifically addressed in *Neal v. McGinnis*, 716 F. Supp. 996 (E.D. Ky. 1989). In *Neal*, a seaman slipped, fell and drowned in the Ohio River during the course of his employment as a deck hand. His Jones Act claim was settled. However, his widow had also asserted a claim against a third party under general maritime law invoking the federal court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. In the diversity action, the seaman's widow argued that a federal court acting in diversity must apply state law rather than general maritime law. The court disagreed, citing *Chelentis* and *Kermarec v. Compagnie Generale Transatlantic*, 388 U.S. 625 (1958), and held that regardless of whether a maritime claim is brought pursuant to the court's admiralty jurisdiction on its diversity jurisdiction, the parties' rights and liabilities are controlled by federal principles of maritime law. The *Neal* court also extended this rationale to maritime claims brought in state courts. 716 F.Supp. at 999.

Further, when maritime wrongful death actions have been brought in state court, the courts in New York, Maryland and Missouri have held that their state wrongful death acts are pre-empted by the general maritime wrongful death law. See, *Scholl v. Town of Babylon*, 466 N.Y.S.2d 976 (A.D. 2 Dept. 1983) (crabber killed when struck by a pleasure boat in state territorial waters); *Jong Hee Park v. U.S. Lines, Inc.*, 439 A.2d 10 (Md. App. 1982) (longshoreman killed when crane he was operating was

blown off deck by bad weather); *Sanders v. Richmond*, 579 S.W. 2d, 401 (Mo. App. 1979) decedent killed when two motor boats collided on Mississippi River).

While this issue was briefed below, the District Court of Appeal did not reach this question and did not discuss it in its opinion. The decision by the trial court to deny a Florida Standard Jury Instruction for claims arising under the Florida Wrongful Death Act, Fla. Stat. § 768.16 et seq. (1985), is entirely consistent, if not compelled, by the decisions of this Court and does not conflict with the decisions of any other federal or state court. With this clear precedent, Petitioner has presented no evidence of the issue's importance and no convincing reason for this Court to review the trial court's disposition of this issue. In any event, since there is no liability, the issue is irrelevant.

CONCLUSION

None of the issues raised by the Petitioner merits review by certiorari. Because the alleged defect in the plans had been corrected by the shipyard prior to the decedent's injuries, the shipowner breached no duty to the decedent prior to relinquishing control of the OMI WABASH to the decedent's employer. Neither did the plans proximately cause decedent's fatal injuries. Any issue relating to the plan's compliance with federal regulations is irrelevant absent a duty owed the decedent and the lack of proximate causation. Finally, the pre-emption issue is moot absent a finding of liability. In any event, absent any evidence of the issue's significance in light of

clear and unconflicting precedent, the issue does not merit review by this Court.

For these reasons and the well considered opinion of the Florida First District Court of Appeal, the petition should be denied.

Respectfully submitted,

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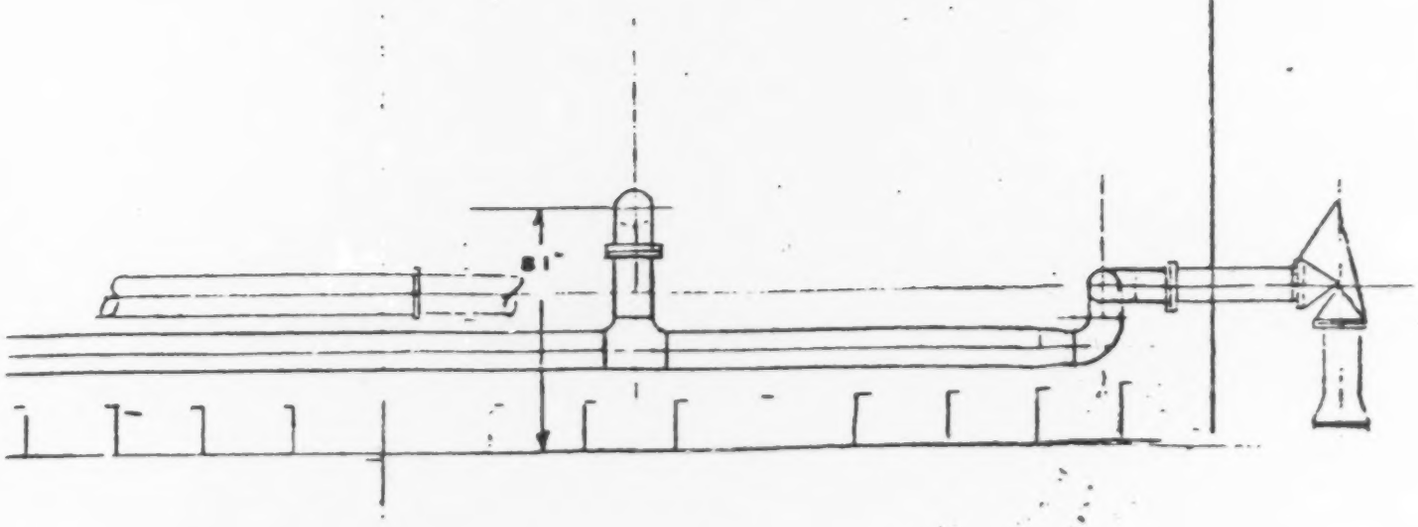
APPENDIX

CARGO TANKS 2 P/C/S



SECTION, FRAME 176 LOOKING AFT

REVIEWED FOR COMPLIANCE WITH
USCG REGULATIONS IN
ACCORDANCE WITH NVC 10-82

APPROVED
SUBJECT TO
COMMENTS IN
ABS LETTER DATED
18 JUN 1985
W M. MANNAN
VICE PRESIDENT
AMERICAN BUREAU
OF SHIPPING
NEW YORK
BY DIRECTION

Filed in Evidence
as
Plaintiff's
Exhibit 21 A Date 9/19/88
Case 86-10500 CA

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PLAINTIFF'S
EXHIBIT
For Identification

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